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Remarks - General

Applicant submits that all claims clearly define novel and unobvious subject matter over each and every reference and any combination thereof.

Amendments to Specification

Examiner stated that the amendment filed July 30, 2008 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the addition of "composite material" in paragraphs [0043] [0044] and [0166], which was not disclosed in the specification as originally filed and has also been added to claims. The term "a composite material" as disclosed in the amendment would introduce new matter and change the description from "a candy bar" to "a composite material candy bar" in paragraph [0164] which is not the same as a generic term "candy bar" as originally described. Therefore, the amendments to the specification introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

See 608.01(l) **Original Claims** In establishing a disclosure, applicant may rely not only on the description and drawing as filed but also on the original claims if their content justifies it.

Where subject matter not shown in the drawing or described in the description is claimed in the application as filed, and such original claim itself constitutes a clear disclosure of this subject matter, then the claim should be treated on its merits, and requirement made to amend the drawing and description to show this subject matter. The claim should not be attacked either by objection or rejection because this subject matter is lacking in the drawing and description. It is the drawing and description that are defective, not the claim.

In response, as said in previous responses to office actions, correcting the specification to reflect what is in the original claims, as filed, is NOT introduction of new matter.

Applicant's original disclosure August 18, 2000, illustrated and recited, "a composite material."

The mere mention that "composite material" changes the description from a "candy bar" to a

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"composite material candy bar" is not sufficient for a prima facie case of rejection under 35 USC 132(a), and is moot. Applicant's original claims 6, 19-23 recite: "wherein said support comprises a composite material." Drawings, the terms "composite support 62, 62A... Milky Way Bar, Snickers Bar, etc.," **"composite candy bar"** throughout the specification, and PTO date stamped disclosure documents 1994, 1996, 1999 showing and testing of composite material candy bars, is direct and factual evidence of a support comprising "a composite material." Examiner has failed to satisfy its burden to articulate a prima facie case. Without adequate evidence of the basis of this rejection, the burden to rebut this rejection with evidence and/or argument has not yet shifted to Applicant. Applicant has evidence in the original claims and in the specification. Examiner does not show sufficient evidence to the contrary.

N.B. Reading the specification shows a "composite material candy bar:"

[0195] A list of some suitable supports, are as follows:

[0196] composite candy bar with caramel, whipped chocolate nougat which is dipped in chocolate

[0197] composite candy bar with an elongated cookie stick, *with caramel on top of the caramel*, which is then dipped in chocolate

[0199] composite candy bar with chocolate, nuts and nougat inside

See MPEP section 2164. "Furthermore, when the subject matter is not in the specification portion of the application as filed but is in the claims, the limitation in and of itself may enable one skilled in the art to make and use the claim containing the limitation. When claimed subject matter is only presented in the claims and not in the specification portion of the application, *the specification should be objected to for lacking the requisite support for the claimed subject matter using Form Paragraph 7.44.* See MPEP § 2163.06. This is an objection to the specification only and enablement issues should be treated separately." 2163.06: "The claims as filed in the original specification are part of the disclosure and therefore, if an application as originally filed contains a claim disclosing material not disclosed in the remainder of the specification, the applicant may amend the specification to include the claimed subject matter."

Examiner thus admits that the terms "composite support 62," and "composite support 62A..." is interchangeable, or one in the same, for the term "composite material support 62, 62A..." or otherwise would have asked for a correction of the specification in the first office action in view of original claims 6, 19-23, and all the recitations of composite support 62 and **"composite candy**

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bar comprising the ingredients of caramel, whipped nougat," etc. See: [0195, 0196, 0199] above, i.e. material not components, and replete with descriptions of composite support Snickers Bar, Milky Way Bar, Baby Ruth Bar throughout the specification, as above. These candy bars are known to one skilled in the art, and notably to an examiner in the required field, to comprise a "composite material." MPEP section 2164 recites: *"When claimed subject matter is only presented in the claims and not in the specification portion of the application, the specification should be objected to for lacking the requisite support for the claimed subject matter using Form Paragraph 7.44."* Examiner had NOT objected to the specification, and thus concurred. (see also 2111 Claim Interpretation i.e. *consistent with* the specification) The evidence is overwhelming that Examiner(s) were well aware that applicant was claiming a composite material. Examiners did not object to name brand composite candy bars found in a grocery store in the specification. Examiner did not object to the specification in view of all claims that recited "a composite support" in the independent claims and only added components in the dependent claims, such as "a composite support... *further including a mess guard, a drip guard, a lollipop.*" Having all claims written as such, examiner had failed to fulfill its burden to identify the support of the application, and having made no requirement for applicant to change the wording of the specification "composite support 62, 62A..." thus understood the meaning of composite support to mean composite material support, such as Milky Way, Snickers, etc. Examiner is required to have come to understand the claims before the first office action.

MPEP Examination

The term "bar" is a single component. As known to one skilled in the art, a "composite candy bar" is a composite material. As above, Examiner's argument claiming "new matter" is moot. Without adequate evidence of the basis of this rejection, the burden to rebut this rejection with evidence and/or argument has not yet shifted to Applicant. Examiner does not have sufficient evidence to the contrary.

Applicant therefore respectfully requests reconsideration and allowance of the amendments to the specification.

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Amendments to claims:

Applicant has amended claims 355, 365, 379, to reflect the ingredient materials from divisional applications 10/163,209 cookie supports, and 10/167,812 granola supports, as generic, so as not to lose the right to rejoin these ingredient materials. Applicant respectfully requests rejoining of these ingredient materials with the above application.

Claim 354, 364, 372 have been amended to recite a "single component support." Those skilled in the art, know that a composite candy bar, such as Milky Way Bar is a single component and would not be confused by the term, which alone is sufficient for enablement (reasonably conclude). Also, Applicant's drawings show a single component support. See at least Figures 27A-27E, 29, 30, 31. In addition, the single component support of a Kudos Bar has basis in the specification. See below:

[0363] Kits intended for frozen confections are made easily as well. Separate components placed in a box at room temperature to construct a certain frozen confection provide easy-to-make and inexpensive kits. An appropriately decorated and shaped container containing a cup of vacuum sealed pudding (individual size) and an elongated candy bar in the shape of a stick. At home the stick is unwrapped and placed into the partially uncovered cup of pudding. The stick and the pudding is then placed in the freezer and becomes a frozen ice pop.

[0393] Kits for the construction of frozen comestibles may be sold in retail stores. A candy bar support(s) may be included with a vacuum packed individual portion(s) of pudding in a desired shape, which is to be constructed and put in the freezer at home. For example, such a combination is a granola bar sold under the trademark Kudos Granola Bar by Mars, Incorporated, inserted in an individual portion of pudding sold under the trademark Hunts Snack Pack Pudding by Hunt-Wesson, Inc of Fullerton, California. The Kudos Granola Bar is unwrapped and inserted in the cup of Hunts Snack Pack Pudding and placed in the freezer. When it is frozen, the pop is taken out of the cup and enjoyed. Different shapes of pudding cups, and a longer granola bar may be used, etc.

[0168] A chocolate covered and slenderized granola bar or cereal bar also is an efficient support 62. One such granola bar is sold under the trademark Kudos by Mars, Incorporated, of Hacketstown, N.J. This granola bar when shaped, frozen and inserted into softened ice cream or frozen yogurt and placed in the freezer provides a totally

edible, supported, and nutritious frozen confection.

Candy supports, cookie supports and granola supports are all represented by support 62, 62A.

When a disclosure describes a claimed invention in a manner that permits one skilled in the art to reasonably conclude that the inventor possessed the claimed invention the written description requirement is satisfied. (MPEP §2163 (emphasis added)). "Reasonable clarity" (MPEP § 2163.02).

Definition of the word Bar

1. a relatively long, evenly shaped piece of some solid substance, as metal or wood, used as a guard or obstruction or for some mechanical purpose: the bars of a cage.

2. an oblong piece of any solid material: a bar of soap; a **candy bar**.

A candy, or confection bar, is well known to one skilled in the art to be "a single component," and as such, is enabled to this person. Since applicant's specification recites "component" as a candy bar, is precisely explained (Kudos) and present in the drawings, and the meaning is fully enabled by the specification and applicant's confection bars, one skilled in the art of making edible supports for frozen comestibles can reasonably conclude in a manner that permits one skilled in the art to reasonably conclude that applicant's composite material support comprises a single component support. Examiner has yet to make a case that Applicant's single component candy bar support is not fully enabled. Examiner lacks reasonable basis for questioning applicant's amendment. Therefore, applicant respectfully requests reconsideration and allowance of the amendment.

Regarding Election/Restrictions

Examiner states that claims 370-382 are directed to a method of making a support, i.e., an invention that is independent or distinct from the invention elected in response filed January 18, 2003 to the original restriction requirement. Since applicant had elected a product and not the method of making in response to the election requirement the method of making the product, i.e., claims 370-382 are withdrawn from consideration as being directed to a non-elected invention See 37 CFR 1.142(b) and MPEP section 821.03. Thus claims 345-348 will not be examined in the

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present office action.

In response: The restriction requirement for which a response was made on January 18, 2003 was for the following:

Species I, wherein the comestible has a support as shown e.g. in Fig 1, or

Species II, wherein the comestible has a plurality of supports as shown e.g. in Gif. 35-39

Further election is also required between

Species III, wherein the support is a composite support, as shown e.g. in Fig. 1, or

Species IV wherein the support is a homogenous support as shown e.g. in Fig. 3

Applicant elected Species III, "composite support." As may be seen above, there was no requirement for restriction of any method claim by an Examiner.

The requirement for restriction of 5/02/2002 also did not require any restriction regarding a method claim. In addition, all previous claims for the above application had been canceled. All present claims (after RCE) are directed to the same invention as elected in species III, as allowed.

37 CFR 1.142 entitles applicant to claim additional species that includes the limitations of a generic claim. As of now, Examiner has not related to applicant how the method claim as filed in the RCE is patentably distinct from the generic claim. As far as applicant is aware, method claims 345-348 includes all of the limitations of the generic claim.

There is no legal justification for the Election/Restriction objection and the premise that, "Thus claims 345-348 (370-382) will not be examined in the present office action." Withdrawing Applicant's claims from consideration is delay of prosecution and prejudicial. Applicant respectfully requests removal of the objection and examination/reinstatement of all pending claims 349-383 for the above claims, as written.

Claim Rejections - 35 USC section 112 (first paragraph)

The examiner states that claims 368 and 369 are rejected under 35 USC 112, first paragraph as failing to comply with the enablement requirement. In the instant case claim 368 as recited is non enabled as there is no disclosure either in the claim or in the specification about what means or

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apparatus or equipment is employed to make a support for a frozen confection as recited.

Claim 368 had already been corrected to recite: A support for a frozen comestible comprising a material comprising two edible ingredient materials, and means for making *said* support. Claim 369 is dependent upon claim 368 and is enabled. In addition, no disclosure of means or apparatus or equipment is required for a means claim. (35 U.S.C. 112, sixth paragraph)

Regarding the term composite material:

"The term "composite material" as added to the claims is objected to as introducing new matter as the term is not disclosed in the original disclosure and the introduction of the term "composite material" changes the description of "a candy bar" to "a composite material candy bar," which is not the same as a generic term 'candy bar as originally described. Therefore, the amendments to the claims introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

As above, in amendments to specification, the term "composite material" does not add new matter to the claims. The term "composite material" had been recited in original claims 6, 19-23. according to **608.01(i) Original Claims** In establishing a disclosure, applicant may rely not only on the description and drawing as filed but also on the original claims if their content justifies it and also consult *MPEP section 2164*. The original claims are part of the original disclosure and as such is not new matter. Also, the specification specifically recites *composite candy bar*, comprising two ingredient materials, as above. A bar that is a composite is a composite material to one skilled in the art. Applicant is not required to cancel the term "composite material" from the claims.

Regarding section 112 Second Paragraph

Examiner has rejected claims 349-359 as being unclear for the recitation of "comprising a material comprising two edible ingredient materials" as it is unclear as to what is encompassed by the terms "ingredient" and "material" and "ingredient material" as it is used in claim 349. Examiner states that it is unclear as to how each of the terms "ingredient" and material are different from

"ingredient materials" as recited in claims 349-359. Thus, the claims use terms ingredient and material and "ingredient material" interchangeably which makes the claims unclear as recited for the purposes of prior art comparison.

[The MPEP repeatedly warns that the Office bears an initial burden of establishing a prima facie case when making a written description rejection. (MPEP §§ 706.07, 2163 (III)(A)). A prima facie case requires a reasonable basis to challenge the adequacy of the written description. (MPEP § 2163.04). The MPEP equates this reasonable basis with "a preponderance of evidence why a person skilled in the art would not recognize in an applicant's disclosure a description of the invention defined by the claims." (MPEP § 2163(III)(A)). Consequently, the Office must provide a reasonable basis to reject a claim for failing to satisfy the written description requirement, and this requires "a full development" of the reasons showing that, by a preponderance of the evidence, a person of ordinary skill in the art would not recognize a description of the claimed invention in the disclosure. In this regard, the MPEP; expressly instructs that merely conclusory statements are insufficient. Rather, every written description rejection "should be stated with a full development of the reasons rather than by a mere conclusion...." (MPEP § 706.03). Stated another way, the Office must adequately explain the perceived shortcomings of the application so that Applicant is properly notified and able to respond. Finally, until the Office establishes a prima facie case, an Applicant is not under an obligation to rebut the rejection. (MPEP § 2163.04). Applicant respectfully submits that such is the case here.]

USPTO personnel must always remember to use the perspective of one of ordinary skill in the art. Claims and disclosures are not to be evaluated in a vacuum. If elements of an invention are well known in the art, the applicant does not have to provide a disclosure that describes those elements. MPEP

In response, ALL of applicant's terms are well known terms in the art. The terms "ingredient," "material" and "ingredient material" are commonly known terms used in hundreds of issued patents. There is no requirement for applicant to teach well known terms already used in commerce at least for confections for well over a hundred years, and much longer in general. (See: mud/grass in the form of bricks for building construction, Egyptian tomb paintings below.) The term "material" is widely known prior art term used in commerce, in the writing of copious patent documents, and in every day life. As of this communication, a boolean search for the term "material" renders 2,025,416 issued patents, not to mention the multiple times it may have been used in each issued patent, patents before 1976, patents outside the united states, reissued patents